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UNITED STATES BANKRUPTCY COURT

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SOUTHERN DISTRICT OF NEW YORK

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Case No. 12-12020-mg

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In the Matter of:

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RESIDENTIAL CAPITAL, LLC, et al.,

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Debtors.

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United States Bankruptcy Court

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One Bowling Green

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New York, New York

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March 1, 2013

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10:04 AM

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B E F O R E:

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HON. MARTIN GLENN

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U.S. BANKRUPTCY JUDGE

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Status Conference RE: Debtors' Second Supplemental Motion

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Pursuant to Fed. R. Bankr. P. 9019 for Approval of RMBS Trust

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Settlement Agreements [Docket No. 1887]

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1 P R O C E E D I N G S

2 THE COURT: All right, please be seated. We're here
3 in Residential Capital, LLC, number 12-12020. We're here for a
4 further pre-trial with respect to the RMBS settlement hearing.
5 We originally had scheduled for today the committee's motion to
6 preclude the evidence. I indicated yesterday we might discuss
7 it but not hear argument on it today, since the debtors and the
8 committee agreed to put off the hearing on that motion.

9 So let's talk about scheduling of the trial. Who
10 wants to begin?

11 MR. RAINS: Good morning, Your Honor. Darryl Rains of
12 Morrison & Foerster for the debtors. Thanks very much for
13 hearing us this morning.

14 I want to report that we have -- by "we" I mean the
15 creditors' committee and myself -- have had conversations about
16 a new schedule. We understand it may not exactly fit with what
17 the Court has in mind. But what we were willing to propose is
18 a new trial date beginning on May 6th.

19 I understand that perhaps yesterday you suggested
20 later in May, but our agreement -- our initial proposal for the
21 Court is to begin on May 6th. And then we have a series of
22 dates that would work off of that date.

23 THE COURT: Well, I -- as I mentioned yesterday when
24 somebody had suggested early May, that's not going to work from
25 the Court's standpoint. It's my very strong preference, as

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1 difficult as it sometimes is to do, that any trials be
2 conducted day-to-day until completed. I don't like -- and I
3 can't set day-to-day trials for the number of hours required in
4 early May. Part of it is I'll be out of town for some of that
5 at a number of different times. So here are the dates,
6 subject -- we need to talk about the time allocations.

7 In the fourth revised joint omnibus scheduling order,
8 in paragraph 13, it had included the tentative allocation of a
9 total of thirty hours of trial time; twelve hours for those
10 supporting the 9019 and eighteen hours for the parties opposing
11 it. And so we need to discuss that. But in order to do a day-
12 to-day trial, the dates -- well, and let me also add, I had --
13 I mentioned this yesterday as well.

14 When we originally scheduled the trial to get the
15 thirty hours in and get it done consistent with the Court's
16 schedule, I had more or less indicated we were going to be
17 going 9 to 9. The Court -- we decided -- the judges decided
18 yesterday, made a decision yesterday that as long as
19 sequestration is in effect, any court hearings at which an ECRO
20 operator, a reporter, is required, will only occur between 9
21 a.m. and 5 p.m., because of inability to pay overtime.

22 So effectively, what that does is really limit us to
23 six-hour trial days. So I need to get five trial days for the
24 thirty hours, assuming that's going to be the amount of time.
25 So the dates that the Court is prepared to set are as follows:

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1 Tuesday, May 28th; Wednesday, May 29th; Thursday, May 30th;
2 Friday, May 31st; and Monday, June 3rd.

3 MR. RAINS: That's acceptable to the debtors, Your
4 Honor. Thank you.

5 THE COURT: Okay.

6 MR. BENTLEY: That's acceptable to the committee as
7 well, Your Honor.

8 THE COURT: Somebody go to the microphone and identify
9 yourselves.

10 MR. BENTLEY: Good morning, Your Honor. Philip
11 Bentley of Kramer Levin for the committee.

12 THE COURT: Good morning.

13 MR. BENTLEY: I have one significant housekeeping
14 issue that I should mention. That is, yesterday evening, after
15 we heard about the Court's preference for a late May trial, I
16 reached out to the committee's experts and asked them could --
17 what weeks could they do. One of my experts is fine. Mr.
18 Cornell is fine with the week of May 27th or '8th.

19 THE COURT: The 27th is a holiday. That's why --

20 MR. BENTLEY: So I'm not sure --

21 THE COURT: -- that's Memorial Day.

22 MR. BENTLEY: -- how we label the week.

23 THE COURT: That's why it's starting Tuesday.

24 MR. BENTLEY: Understood, Your Honor. My other
25 expert, Mr. Morrow, who handled the reunderwriting project, has

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1 two other trials that are set to go that week, one in I think
2 Dallas, and the other in Utah. So I'm not sure how we handle
3 that, Your Honor, but I wanted to raise it with the Court.

4 THE COURT: That's his problem and your problem. You
5 have enough time to try and figure it out. I just -- I was
6 ready to go forward with the trial as scheduled. There's been
7 a request to adjourn it, and I'm agreeable to that. I've
8 worked hard to try and find dates when we can do this. I have
9 no objection to taking witnesses out of order.

10 So with five trial days, I'm certainly prepared to
11 accommodate your expert's scheduling problem, so long as he can
12 be fit in within those five days.

13 MR. BENTLEY: We will do our best, Your Honor.

14 THE COURT: Okay. And that's -- you know, I would
15 expect that all counsel -- I don't know how many we're talking
16 about; I don't know how many live witnesses, fact and expert,
17 are anticipated. Scheduling problems frequently come up for
18 witnesses. I guess the couple of things that I insist on in
19 any trial is you all work to sort out the order in which the
20 witnesses are going to be called. Your next witness needs to
21 be in court and available, ready to go on, when a witness is
22 finished. So I don't want to hear at 2 o'clock or 3 o'clock in
23 the afternoon that we're out of witnesses for today. That's
24 unacceptable.

25 So you all need to work in terms of scheduling

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1 witnesses, to make sure. Because sometimes cross-examination
2 winds up shorter than was anticipated or there's no redirect,
3 or whatever. And I don't think I've ever had to do this. I've
4 warned about it. I said, if your next witness isn't ready to
5 go on, you rest.

6 MR. BENTLEY: Well, we understand Your Honor's ruling
7 and --

8 THE COURT: Okay.

9 MR. BENTLEY: -- we will do our very best to work
10 around --

11 THE COURT: I don't want to be difficult about it.

12 MR. BENTLEY: -- it.

13 THE COURT: But it's difficult enough for me to come
14 up with a schedule. And I appreciate experts have busy
15 schedules. I would think that at some point in those five
16 days, even if he's engaged in a trial elsewhere, he'll find his
17 way here to testify.

18 MR. BENTLEY: As I said, we will do our very best.

19 THE COURT: All right. So does anybody else want to
20 be heard about those dates?

21 Okay.

22 MR. RAINS: Then, Your Honor, I think what we'd like
23 to do, consistent with the prior order and with my
24 conversations with the creditors' committee, we would propose
25 having the pre-trial submissions -- that's direct testimony,

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1 exhibits, adverse witness list, and the Rule 26 disclosures,
2 due two weeks earlier --

3 THE COURT: Well, let's --

4 MR. RAINS: -- at May 14th.

5 THE COURT: Let me go through a series of questions I
6 have.

7 MR. RAINS: Oh, fantastic.

8 THE COURT: Okay? And let's see where we come out on
9 it. Is all fact and expert discovery complete?

10 MR. RAINS: With one small exception, yes, Your Honor.

11 THE COURT: What's the exception?

12 MR. RAINS: We have designated one additional witness,
13 one of our directors, Pam West. And we are currently in -- I'd
14 say discussions but maybe a dispute would be more fair, over
15 whether we're allowed to add her. We've offered her for
16 deposition, but we're still in discussions or having a dispute
17 about her.

18 THE COURT: And she'd be testifying as a fact witness?

19 MR. RAINS: Yes, sir.

20 THE COURT: All right. I'll let you try to sort
21 out -- I don't want to deal with a dispute today about whether
22 you can add a witness or not. In the first instance, work with
23 other counsel and see if you can resolve it. If you can't you
24 can raise it with me. Okay?

25 MR. RAINS: Thank you.

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1 THE COURT: Have all expert reports and exhibits been
2 submitted?

3 MR. RAINS: Yes, Your Honor.

4 THE COURT: Have all deposition designations and
5 counter-designations and objections been provided, or was that
6 going to come at the March 4th --

7 MR. RAINS: That needs -- that's one of the things
8 that needs to happen before our pre-trial.

9 THE COURT: Are all pre-trial briefs, with the
10 exception of any motions in limine, been submitted?

11 MR. RAINS: One exception. The answer is generally
12 yes. We had two objectors who had extra time to object. We
13 still owe them reply briefs. I wanted to ask the Court if we
14 could have until March 15 to do those reply briefs. That's
15 Assured Guaranty and the junior secured noteholders.

16 THE COURT: All right. Does anybody have an objection
17 to that date?

18 MR. BENTLEY: We do not, Your Honor.

19 THE COURT: Ms. Goldstein?

20 MS. GOLDSTEIN: Irena Goldstein for Assured Guaranty.
21 We agreed to March 8th. And so I don't have any authority to
22 go to March 15th for an extension of time.

23 THE COURT: Well, since we're talking about a trial at
24 the end of May, I'll permit it to be March 15th. Okay?

25 MS. GOLDSTEIN: Okay, thank you.

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1 THE COURT: Given the later trial date, it should not
2 adversely affect your client.

3 MS. GOLDSTEIN: I understand, Your Honor.

4 THE COURT: Okay, that's fine.

5 MS. GOLDSTEIN: It's just that we agreed yesterday.

6 THE COURT: That's fine.

7 MR. RAINS: Thank you, Your Honor. Apart from
8 those --

9 THE COURT: I still have more questions. I still have
10 questions.

11 What else remains to be submitted before trial?

12 MR. RAINS: I think it's what we mentioned. We owe
13 our direct testimony, our exhibits --

14 THE COURT: At paragraph 12 of the fourth amended
15 omnibus, was all adverse witness lists, exhibit lists, and
16 direct testimony, along with any other disclosures required by
17 Rule 26(a)(3) shall be filed with the Court on March 4th.
18 That's what you're referring to?

19 MR. RAINS: Yes, Your Honor.

20 THE COURT: Okay. Have the parties discussed time
21 allocations for the timed trial?

22 MR. RAINS: What I know, Your Honor, is that the Court
23 initially indicated twelve hours and eighteen hours. I know
24 that the creditors' committee wants a bigger share of the time,
25 and we also want a bigger share of the time. That's where

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1 we're at.

2 THE COURT: Okay. We'll come back to that question in
3 a minute. I guess that answered my next question. Do any of
4 the parties object to the tentative allocations of twelve and
5 eighteen hours contained in paragraph 13 of the fourth revised
6 omnibus scheduling order? Okay. We'll come back to that.

7 Do the parties believe that closing trial briefs
8 should be scheduled followed by a date for final argument? We
9 didn't talk about that before. I mentioned in court yesterday,
10 I have read virtually everything that's been filed -- that's
11 been submitted, and I have the unredacted versions. They're
12 all on my iPad. I've been reading the stuff. I still have --
13 I haven't gone through quite all the exhibits that were
14 submitted, but I've been through most everything.

15 MR. RAINS: My condolences, Your Honor.

16 THE COURT: So what are -- how do counsel -- what is
17 counsel's view about whether closing trial briefs should be
18 scheduled? What I would have in mind, then -- and so just to
19 give you an idea of specifically what I had in mind. If the
20 trial concluded on Monday, June 3rd, closing trial briefs would
21 be simultaneous briefs by both sides on June 17th, and
22 simultaneous replies on June 24th. And --

23 MR. RAINS: That's agreeable to us, Your Honor.

24 THE COURT: -- does somebody from the committee have a
25 view on that? Mr. Kaufman?

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1 MR. KAUFMAN: Philip Kaufman for the committee, Your
2 Honor. That's acceptable to us.

3 THE COURT: Does anybody else have a view on that?
4 Because there are others -- come on up to the microphone if you
5 want to speak.

6 MR. SIDMAN: Your Honor, I actually wanted to clarify
7 one point earlier --

8 THE COURT: You have to identify yourself.

9 MR. SIDMAN: I'm sorry. My name is Howard Sidman from
10 Jones Day, representing FGIC.

11 I wanted to clarify one point that Your Honor raised
12 just a few moments ago. In debtors' reply briefs, they raised
13 an issue for the first time -- took a position for the first
14 time, Your Honor, with respect to the scope of the releases
15 contained in the settlement agreement.

16 As Your Honor may be aware, the settlement agreement
17 between institutional investors and the debtors contains a
18 carve-out for claims by monoline insurance companies. And we
19 had, in discovery, asked various witnesses of the debtors what
20 that means. And they said well, we believe that the claims of
21 the monoline insurers are not released by the settlement. And
22 in fact, we've tried to ask the question to the debtors
23 themselves, what is the scope of the release. And it was still
24 unclear. We object on that basis, Your Honor, to the
25 settlement agreement, that it was not clear in our minds what

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1 the scope of the release was.

2 Now, for the first time in their papers, they've taken
3 the position that all of FGIC's claims are released by the
4 settlement, even though FGIC's not a party to the settlement,
5 didn't sign the settlement agreement and in fact, has separate
6 and independent claims that should not be released and cannot
7 be released. And so we would like permission from Your Honor,
8 to file a very brief surreply to address that particular issue.

9 THE COURT: Mr. Raines, what's your view on that?

10 MR. RAINS: Well, I believe Mr. Sidman has misstated
11 our position that the release has always said, and it is our
12 view that it releases claims that are not independent of the
13 rep and warranty claims, and it does not extend to what you
14 would call an independent claim. I --

15 THE COURT: Direct claims are not -- any direct claim
16 that FGIC or anyone else would have are not released by --

17 MR. RAINS: Well, in specific, Your Honor, what we've
18 talked about are fraudulent inducement claims, which we think
19 are independent of the rep and warranty claims. And we -- our
20 position, the debtors' position, is that those are not
21 released. The other claims are. Other parties to the
22 settlement agreement may have different points of view about
23 that, but that's our interpretation of the agreement as it
24 stands.

25 If the question to me is can he file a surreply?

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1 Sure, we don't oppose that. If the Court's willing to take
2 more briefing, that's fine.

3 THE COURT: Oh, I'm just dying to see more briefs.

4 Mr. Siegel, do you want to be heard?

5 MR. SIEGEL: Now I know why I showed up this morning.

6 Good morning, Your Honor. I just for a point --

7 THE COURT: You have to identify yourself for the
8 record.

9 MR. SIEGEL: I'm sorry. Glenn Siegel from Dechert on
10 behalf of Bank of New York Mellon. Just as a point of
11 clarification, the monolines have whatever direct claims they
12 want to assert subject to anybody's ability to object to them.
13 The claims with respect to the -- what are called put-back
14 claims, the rep and warranty claims, belong to the trusts.
15 They simply don't have the ability to act for the trusts. The
16 trusts can do whatever they want to do.

17 The trusts have contractual relationships with their
18 insurers. If we breach those, they may have a dispute with us.
19 But our position very clearly is that's got nothing to do with
20 the bankruptcy court. If they want to assert direct claims,
21 they should do so. I look forward to seeing their surreply,
22 but I thought --

23 THE COURT: Well, look --

24 MR. SIEGEL: -- I would make that clear.

25 THE COURT: Do you want to be heard too? Come on up.

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1 He's finished.

2 MR. HOFF: Jonathan Hoff, Cadwalader, Wickersham &
3 Taft for MBIA. I hadn't planned on saying anything, but
4 obviously if there's going to be a surreply, we'd at least like
5 the opportunity to con --

6 THE COURT: What's your view about the releases?

7 MR. HOFF: Well, we agree with Mr. Sidman, that the
8 debtors are all over the map on this issue. They took a
9 completely different position in their reply brief than Mr.
10 Rains described, inconsistent with their witnesses. One of --
11 as I'm sure you understand from our papers, there's a lot of
12 ambiguity in that I don't think that either the debtors or the
13 trustees understand our claims to be able to articulate what is
14 or isn't in there. But if there's going to be -- we would like
15 the opportunity for a surreply if Your Honor is going to permit
16 that. And we would make it short.

17 THE COURT: Mr. Kaufman, what's the committee's
18 position on this? Or Mr. Bentley? I don't know who wants to
19 speak.

20 MR. KAUFMAN: Philip Kaufman for the committee. Your
21 Honor, the committee does not take a position on that.

22 THE COURT: Okay. Anybody else want to be heard on
23 this issue? Releases are a real sensitive subject with me, I'm
24 going to tell you right now.

25 Okay. Here's what I would -- before I'm going to

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1 allow anybody to do a surreply -- there's enough time to do
2 this -- I want the parties to the dispute about what are the
3 scope of the releases to meet and confer and see if you can
4 resolve and put together a stipulation that puts this issue to
5 rest before I get a lot of briefs. Okay? Mr. Rains, I'm not
6 going to -- I don't want to get into whether the debtors'
7 position has varied from one brief to another or whatever.
8 That's not -- I'm not worried about that today. What I want to
9 know about, is there a live dispute about what is proposed to
10 be released? Okay?

11 It may be that there isn't a dispute. And if there's
12 an issue about -- that requires clarification, put it in the
13 form of a stipulation if you can all agree on it. How much
14 time do you think you need to do that? Because what I'd like
15 to -- I want to keep this train moving forward, okay? And so
16 what I'd like is, take the next week to see if you can resolve
17 this issue and put it in the form of a stipulation that the
18 Court will approve. And if you can't, we'll have a telephone
19 conference, and I'll allow some limited briefing.

20 I don't want to go through: you file a brief, they
21 file a brief, somebody else then wants to file a brief. But so
22 can you do that in the next week; meet and confer and see if
23 you can resolve by stipulation as to what -- maybe you can put
24 this issue to rest.

25 MR. RAINS: Yes. If we could have -- why don't we say

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1 ten days, a week from Monday? Would that work?

2 THE COURT: Fine.

3 MR. RAINS: Thank you, Your Honor.

4 THE COURT: Is that acceptable to counsel?

5 UNIDENTIFIED SPEAKER: Yes, Your Honor.

6 MR. SIDMAN: Thank you, Your Honor.

7 THE COURT: Okay.

8 MR. RAINS: Thanks so much.

9 THE COURT: See if you can resolve it. We have enough
10 disputes that this may not be a live issue. Okay.

11 All right. This schedule -- let me hear about the
12 time allocation. How many -- how many live witnesses am I
13 going to hear? I've got probably ten boxes of briefs,
14 affidavits, expert reports, exhibits, in chambers. They all
15 got loaded on my iPad so I haven't had to go through all the
16 boxes. I've been reading them on an iPad. But my clerk's been
17 going through binders.

18 But I don't know -- with the trial put off until the
19 end of May, I will have to go back and re-read the declarations
20 and expert reports closer to the trial date. But I will
21 have -- when I take the bench at the trial, I will have read
22 all that stuff.

23 Let me -- a couple other issues that I want to raise.
24 I had them -- I was also going to set -- assuming the trial
25 date begins Tuesday, May 28th, I was also going to set a

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1 deadline for filing of motions in limine.

2 MR. RAINS: Great.

3 THE COURT: And so tentatively, here are the dates
4 that I wrote down. Deadline for filing the motions, May 6th.
5 Deadline for responses, May 13th. Deadlines for reply, May
6 17th. It's a few extra days than I would give, but the Jewish
7 holiday of Shavuot is the 15th and the 16th of May, and some
8 people may observe it, and therefore, May 17th is the date for
9 replies. Argument on motions in limine, May 23rd.

10 MR. RAINS: May 23rd, Your Honor?

11 THE COURT: May 23rd at 10.

12 MR. RAINS: Thank you.

13 THE COURT: And then separate question. Do -- does
14 the committee and the debtor want a separate date for hearing
15 on the preclusion motion, which is fully briefed. There's an
16 omnibus hearing date in ResCap of May 14th. And I'm certainly
17 prepared to hear that motion then. I was prepared to hear that
18 motion today.

19 For those of you who weren't here yesterday, you
20 probably know I expressed my frustration from the bench that
21 after spending a very -- after denying a motion to continue the
22 preclusion motion and spending a lot of time on it, I was ready
23 to hear it today, I acceded to the request to put it off. But
24 I leave it to you. Do you want it heard on May 23rd with
25 others or do you want it heard separately?

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1 MR. RAINS: A couple of things, Your Honor. First the
2 schedule on the in limine motions is fine. Can I ask -- can we
3 add to that same schedule Daubert motions. I know there are
4 going to be a number of Daubert motions.

5 THE COURT: I would consider that essentially an in
6 limine motion, if you're trying preclude evidence on the basis
7 of Daubert.

8 MR. RAINS: All right. So that sched --

9 THE COURT: I certainly read -- I read some references
10 in the briefs where people question whether an expert's
11 methodology satisfied Daubert. That wasn't the exact terms in
12 it, but I saw in the briefs that there were questions raised
13 about that.

14 MR. RAINS: Right. So if we add to that schedule,
15 Daubert, those dates are acceptable to us. On the pre --

16 THE COURT: Does the committee have a view on those
17 dates? Mr. Kaufman or Mr. Bentley?

18 MR. BENTLEY: We're fine with that schedule.

19 THE COURT: What about the preclusion motion?

20 MR. RAINS: I have told Mr. Kaufman, who's anxious to
21 have it heard, that I'm willing to have it heard at an earlier
22 date. So whatever date --

23 THE COURT: May 14th.

24 MR. RAINS: -- works for the Court and Mr. Kaufman
25 will be fine with us.

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1 THE COURT: Mr. Kaufman?

2 MR. KAUFMAN: One consideration, Your Honor. We do
3 very much want to have the preclusion motion heard separately
4 from the in limine motions. But one concern which we expressed
5 in our papers is that the -- we believe the preclusion motion
6 should be decided before the time that the debtors are required
7 to submit their declarations, because it will color the whole
8 of that.

9 And Mr. Rains reported that based on an assumed new
10 trial date of May 6th, we had agreed to the submission of
11 declarations two weeks before that. Now that we're not going
12 to be going to trial until the end of May, we believe that that
13 date should be three weeks for submission of declarations. And
14 we'd like to argue the preclusion motion sometime before that.

15 THE COURT: The preclusion motion will be heard on
16 April 11th. It's a long calendar, and it's set for 10 o'clock.
17 Let's schedule the argument on preclusion for 11:30.

18 UNIDENTIFIED SPEAKER: Your Honor, we didn't hear that
19 back here.

20 THE COURT: I'll schedule it for April 11th at 11:30.
21 I've got a ResCap calendar at 10. So that if people aren't
22 interested in everything else, come at 11:30. All right --

23 MR. BENTLEY: Your Honor --

24 THE COURT: Do we need -- hold on, Mr. Bentley. With
25 the schedule that I've given, we need a date for -- that

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1 replaces the March 4th date for submission of everything.

2 MR. RAINS: So, Your Honor, your usual rule is one
3 week in advance of trial. We've agreed, in this case, to two
4 weeks in advance of trial. So --

5 THE COURT: That would be helpful to me. I mean,
6 frankly --

7 MR. RAINS: -- so we're very happy with May 14, Your
8 Honor.

9 THE COURT: Mr. Kaufman, or --

10 MR. KAUFMAN: The only problem with May 14th, Your
11 Honor, is that's -- that is essentially in the middle of when
12 the in limine and Daubert motions are going to be made. And it
13 seems a little odd to have the submission of all that material
14 in advance of -- I mean, after --

15 THE COURT: Would you please trust that when I read
16 the declarations, if I strike -- if I preclude evidence on
17 advice of counsel, I will disregard --

18 MR. KAUFMAN: Okay.

19 THE COURT: -- what's in the papers.

20 MR. KAUFMAN: I have complete --

21 THE COURT: This is not a jury. This is -- okay?

22 MR. KAUFMAN: I have full trust, Your Honor.

23 THE COURT: Okay. All right. So May 14 was the date
24 for --

25 MR. RAINS: Thank you, Your Honor.

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1 THE COURT: All right, so let's talk about the twelve-
2 and eighteen-hour allocations. Mr. Hoff, do you want to --

3 MR. HOFF: I'm sorry, Your Honor. It's Jonathan Hoff
4 again. I'm trying to contract the dates. But are we doing the
5 in limine motions before or at the same time that they
6 submit -- that the parties submit their exhibits?

7 THE COURT: Well, they're going to submit the exhibits
8 on May 14th. You ought to have the -- I mean --

9 MR. HOFF: I think we would want to know what the
10 exhibits are and the testimony is before we make the in limine
11 motions.

12 THE COURT: It isn't going to work. Okay.

13 MR. HOFF: No?

14 THE COURT: Because I want the in limine motions filed
15 May 6th. It may well be that the exhibit list is going to
16 contract or -- it isn't going to expand, okay? It may contract
17 if I preclude certain evidence.

18 MR. HOFF: Right, well, there may be exhibits that go
19 on the list that didn't -- that weren't used in the
20 depositions, which I suspect is likely to happen.

21 THE COURT: All right. Let's talk about the time
22 allocation. How many live witnesses am I likely to hear?

23 MR. RAINS: Your Honor, I just tried to tally them up.
24 I believe we have -- don't hold me to this exact number, but I
25 believe we have ten direct testimony -- ten percipient

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1 witnesses and --

2 THE COURT: Ten fact witnesses.

3 MR. RAINS: -- and four -- four experts. I believe
4 that Ally has a witness. I believe that the institutional
5 investors --

6 THE COURT: Is that an expert or a fact witness?

7 MR. RAINS: A percipient witness, Mr. Devine. I
8 believe that the institutional investors and the Talcott
9 Franklin group, our counterparties to the settlement, may be
10 offering declarations or testimony.

11 I guess, just to put our position simply on the table,
12 we think the allocation ought to be fifteen and fifteen. And
13 the simple reason is, we have on our side, not just the
14 debtors, but we have two plaintiffs' groups, we have Ally, and
15 we also have the trustees, all of whom are charged on our side
16 of the ledger.

17 So between allocating time among six parties and the
18 number of witness who we'll have to redirect, we think the
19 right split is fifty-fifty.

20 THE COURT: Look, if you have ten fact witnesses,
21 you're going to put in declarations, they've got to use their
22 time to cross-examine them. So what I understood at the
23 earlier pre-trial conference was that you had more witnesses
24 than they had witnesses. Okay. You put them in in writing.
25 They've got to use their time to cross-examine them. So maybe

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1 you use some of your time on redirect. But it's more of a
2 burden on those responding or opposing the motion than
3 supporting the motion.

4 How many -- Mr. Kaufman, how many witnesses does the
5 committee anticipate?

6 MR. KAUFMAN: The committee has no fact witnesses,
7 Your Honor. We have two expert witnesses. And my
8 understanding is that at least a couple of the members of the
9 committee will have their own experts. I don't know the exact
10 number right now. But I think it may be two. So that's a
11 total of four experts. As Your Honor pointed out, given the
12 number of witnesses on the other side, we have a lot of work to
13 do in terms of cross-examinations.

14 Mr. Rains just said -- I think I heard him say that
15 there are ten direct --

16 THE COURT: He said ten fact witnesses.

17 MR. KAUFMAN: -- fact witnesses. I'm a little puzzled
18 by that since we had -- there were eight designated by the
19 deadline that Your Honor had set in the prior scheduling order.
20 And recently, the debtors purported to designate two so-called
21 rebuttal fact witnesses, including Ms. West, one of the
22 directors, and also Mr. Whitlinger, neither of whom was
23 designated as a fact witness originally. We object --

24 THE COURT: We'll see whether rebuttal -- you know,
25 whether it's appropriate --

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1 MR. KAUFMAN: -- there is --

2 THE COURT: -- rebuttal.

3 MR. KAUFMAN: -- we don't believe they're rebuttal to
4 start with. We believe that their right to designate has long
5 since passed. So if they are excluded, there are eight fact
6 witnesses. And we did think Mr. Devine was among the eight. I
7 may have miscounted. But it seems to us -- they have three
8 experts that we know about -- sorry --

9 THE COURT: He just said four --

10 MR. KAUFMAN: -- I apologize. Four experts. So
11 that's a minimum of twelve witnesses to cross-examine. It may
12 be as many as fourteen.

13 In terms of allocation, we believe that at minimum it
14 should be twenty-ten in favor of those opposing in the
15 allocation. We don't think eighteen-twelve, given the
16 disparity in witnesses, is fair.

17 THE COURT: Anybody else want to be heard on the time
18 allocation?

19 When I set the twelve and eighteen hours, I did it
20 after asking everyone how many fact and expert witnesses they
21 anticipated calling. It was on that basis that, because the
22 debtors and I would put the -- in light of the number of
23 witnesses that the parties supporting the settlement -- because
24 it also included the investors -- had indicated they were going
25 to call, it was many more witnesses than the objectors were

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1 calling. That's why there was an unequal allocation of the
2 time. More time -- with written direct, more time is required
3 for cross-examination.

4 The scheduling order had, in bold strokes, four-hour
5 time limits on certain of the expert depositions, that allowed
6 some reallocation among experts. I don't know how that played
7 out in the end.

8 UNIDENTIFIED SPEAKER: Just fine, Your Honor.

9 THE COURT: Okay. So if you depose an expert for four
10 hours, I can't believe that you'll want to cross-examine them
11 at a trial for more than an hour or two, frankly. You know,
12 you spend four hours in a deposition, and my experience is the
13 shorter time you spend with cross-examining an expert in trial,
14 the better off you are.

15 You'll come out of a four-hour deposition with three
16 or four or five points that you want to raise in cross-
17 examination. Those are usually the most effective kinds of
18 examination; not one that drags on. I don't allow examinations
19 to drag on. If I think I understand the points that people are
20 trying to make, I'll tell you to move on, okay, even though you
21 think you can hammer the witness with six more questions on it.
22 If I get the point, I may well say let's move on. Okay.

23 So I probably said this at the time I did those
24 tentative allocations, but let me say it again. On any trial
25 of more than a day, I do timed trials. And whenever I've done

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1 it, in each of those trials, the parties have finished the
2 trial without using all of the time allocated; because what's
3 happened is, when they know they only have twelve hours, they
4 prepare their case to use twelve hours or less. And in every
5 case, they've used less than the allocated time. I've never
6 gotten to the end of one of these trials and somebody said,
7 Judge, I need more time. Every one of them has ended early.

8 Yes, there's a lot of parties involved here. But I'm
9 going to stick with the twelve and eighteen-hour allocation.
10 That's a very heavy demand on court time. And you need to
11 tailor your cases to do that. And what I do in the timed
12 trials, typically at each recess or certainly at a lunch break
13 or the end of the day, my law clerks are keeping track of the
14 time and will tell you what you have left; what you've used and
15 what you have left.

16 I was going to be super magnanimous and schedule
17 closing arguments for a different day and not -- so you
18 wouldn't be -- frankly, the thirty hours wouldn't include the
19 time you spend in closing argument. All right. So I'm
20 scheduling five trial days, six hours a day, for evidence and
21 whatever minor arguments occur during trial. I didn't say --
22 the date that I sort of tentatively picked -- assuming -- I
23 gave you the dates for trial briefs, June 17th, June 24th. And
24 what I contemplated was scheduling closing argument for July
25 10th, so as not to interfere with the Fourth of July holiday,

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1 to give me enough time to read all of those closing trial
2 briefs. And I wouldn't schedule anything else for July 10th,
3 and I won't count that time -- you know, you'll have to sort
4 out six hours of time for closing arguments. So in effect,
5 I've really already expanded the twelve and eighteen
6 allocation.

7 Setting the argument for some period after the last
8 brief is in will give the Court time to make sure I've read all
9 the briefs. Mr. Bentley?

10 MR. BENTLEY: Your Honor, I hate to say this. I am
11 scheduled to be out of the country on July 10th. If Your Honor
12 can maybe --

13 THE COURT: When are you going to be back? When are
14 you leaving; when are you going to be back?

15 MR. BENTLEY: I'm leaving on Saturday the 7th. So I
16 am here the prior week.

17 THE COURT: The problem is if the last brief is due
18 June 24th, and I'm getting simultaneous briefs, it will do
19 little good if I don't have time to read them and review the
20 cases. When are you back?

21 MR. BENTLEY: On Monday the 22nd.

22 (Pause)

23 THE COURT: Closing arguments will then be July 1st.

24 MR. BENTLEY: Thank you very much, Your Honor.

25 UNIDENTIFIED SPEAKER: Your Honor, was that Monday,

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1 July 1st?

2 THE COURT: Yes.

3 (Pause)

4 THE COURT: All right. So let me just go over the
5 dates, make sure we're all on the same page about it.

6 Argument on the preclusion motion, no further briefing
7 permitted; April 11th at 11:30. Deadline for filing motions in
8 limine and Daubert motions, May 6th. If I give you a date,
9 it's 5 p.m. Responses to motions in limine and Daubert
10 motions, May 13th. Reply deadline May 17th. Argument May
11 23rd, 10 a.m. May 14th is the deadline for submitting
12 everything that is otherwise now covered by paragraph 12 of the
13 fourth omnibus -- fourth revised joint omnibus scheduling
14 order.

15 Trial dates. May 28th, 29th, 30th, 31st, and June
16 3rd. Schedule will be essentially the following. 9 to 10:30
17 followed by a fifteen-minute break. 10:45 to 12:15, followed
18 by a lunch break. 1:45 to 3:15, fifteen-minute recess. 3:30
19 to 5 o'clock. Those are six hours each, five days.

20 If we have a few minutes left of a witness at 5
21 o'clock, we'll endeavor to accommodate them so a witness can be
22 completed. The state court found that when they put the 4:30
23 cutoff date and required everybody to leave, it didn't work so
24 well. They have done away with that requirement.

25 After 5 o'clock, we won't have an ECRO available. We

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1 might stay late to discuss trial issues that don't require a
2 reporter present. And if need -- as frequently occurs in a
3 trial, we don't necessarily need a transcript for some of those
4 things, and so if necessary, what we can -- you shouldn't think
5 you're going to be thrown out of the courtroom at 5 o'clock.

6 So I understand there continues to be a dispute about
7 the debtors adding one witness.

8 MR. KAUFMAN: I believe it's two witnesses, Your
9 Honor.

10 THE COURT: Two?

11 MR. KAUFMAN: Yes.

12 THE COURT: I thought it was just one direct --

13 MR. RAINS: We've designated two rebuttal witnesses,
14 Your Honor. The difference is, Mr. Whitlinger, one of the
15 witnesses, was already deposed, whereas Pam West, the other,
16 has not been deposed. So --

17 THE COURT: Well, look. Rebuttal witnesses -- your
18 time allocation is -- the problem is, they're the ones that got
19 to cross-examine; you can throw in a declaration. I'm pretty
20 strict about what's appropriate rebuttal.

21 MR. RAINS: So, Your Honor, I'm convinced they are.
22 And the simple explanation is that we had to designate our fact
23 witnesses before we had their objections, and so --

24 THE COURT: What are they rebutting?

25 MR. RAINS: Allegations about the due care of the

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1 directors. They're both directors, and we learned things about
2 the plaintiffs' -- or the objectors' position in their
3 objections, which we got in December, which they submitted
4 after discovery was done and after we had designated our
5 witnesses.

6 No we know more about their objections, we'd like to
7 add two directors to our list.

8 THE COURT: When did you advise them that you wanted
9 to add the two directors to the list?

10 MR. RAINS: Two or three weeks ago. I'm not sure,
11 but --

12 What we've done, Your Honor, is one was already
13 deposed. We think there's no prejudice there. On the other
14 one, we've offered her deposition. We haven't been able to get
15 over that hurdle yet.

16 THE COURT: Mr. Kaufman?

17 MR. KAUFMAN: There is nothing for these witnesses to
18 rebut, Your Honor. The fact that we made arguments based on
19 the discovery we took in our objections is not evidence. These
20 witnesses were designated with descriptions of proposed
21 testimony that is word-for-word identical to the descriptions
22 given for the witnesses designated as direct witnesses --

23 THE COURT: You're saying --

24 MR. KAUFMAN: -- at the beginning.

25 THE COURT: -- it's cumulative of -- the proposed --

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1 MR. KAUFMAN: Completely.

2 THE COURT: -- testimony would be cumulative.

3 MR. KAUFMAN: There's nothing to rebut. They're also
4 way late in designating witnesses.

5 THE COURT: Are you saying --

6 MR. KAUFMAN: The fact that we --

7 THE COURT: Stop.

8 MR. KAUFMAN: I'm sorry.

9 THE COURT: Stop. Are you saying that the description
10 they've given you of the proposed testimony is cumulative of
11 the testimony of other directors that they're offering in their
12 case-in-chief?

13 MR. KAUFMAN: Yes. The -- one other point in response
14 to what Mr. Rains said. Yes, we did take the deposition of Mr.
15 Whitlinger. We did that with the expectation that he was not a
16 listed witness. We did take his deposition. Because he was
17 not listed as a witness who would be testifying at trial, we
18 used a very small amount of time to depose him. It was not the
19 same thing as if we had expected him to --

20 THE COURT: Well, you might want to use part of the
21 deposition -- a designation of the deposition as part of your
22 case. I don't know. That's --

23 MR. KAUFMAN: We --

24 THE COURT: I didn't stop -- I didn't prevent you from
25 taking depositions in the case.

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1 MR. KAUFMAN: Your Honor, we took seriously the
2 deadlines that were in the scheduling order for designating
3 fact witnesses. These new so-called rebuttal witnesses were
4 designated a couple of weeks ago. Neither of them is giving
5 rebuttal testimony. And we think that they shouldn't be
6 testifying.

7 THE COURT: Well, I don't have a record on which to
8 decide this issue now. Mr. Rains, if the testimony is
9 cumulative, if you've addressed the issue of due care as part
10 of your case-in-chief, and certainly the briefs that I got on
11 the preclusion motion specifically, in part, address issues
12 about due care and -- et cetera, the chances of me allowing you
13 to offer that evidence on rebuttal is pretty small. But I'm
14 not going to rule on it now.

15 Mr. Kaufman, take the deposition. I'm not -- you
16 know, it's the only additional discovery I'm going to permit.
17 If I wind up letting -- what I don't want to do is get to the
18 date for motions in limine and say all right, I'm going to
19 permit it. And then you're going to say, well, I need the
20 deposition. Take the deposition.

21 MR. KAUFMAN: Okay, Your Honor. Before we do that,
22 however, we would like to see Ms. West's documents, which have
23 not been produced and --

24 THE COURT: Oh, really?

25 MR. KAUFMAN: Oh, really. Mr. -- the debtors -- when

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1 the committee served its document request back in August, all
2 of the directors were included within the definitions that
3 required the debtors to produce documents. They took the
4 position that with respect to independent directors, such as
5 Ms. West, Morrison Cohen, which is their outside counsel, would
6 be responsible for collecting documents. Morrison Cohen did
7 not do that with respect to Ms. West.

8 And we have -- we do know that a few documents came
9 into the possession of the examiner's depository that appear to
10 be Ms. West's handwritten notes. Those notes are limited in
11 time. They only run through April 11. They don't include more
12 than a month, therefore, between the time they end and the time
13 the petition date and the settlement occurred.

14 We have -- I have had discussions and e-mail exchanges
15 with Mr. Rains over production of these documents. If we get
16 those documents timely, we will review them and take her
17 deposition. But I don't see that we should be able to have to
18 take her deposition without her documents.

19 THE COURT: Mr. Rains.

20 MR. RAINS: Your Honor, I don't agree with the
21 characterizations, but the short answer is, we have offered to
22 produce her personal documents prior to her deposition. We
23 will do that.

24 THE COURT: All right. I'm going to give you a
25 dead -- I'm imposing a deadline of 5 p.m. Friday, March 8th for

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1 complete production of documents for this prospective witness.
2 The fact that her documents have not previously been produced,
3 if anything, cuts in favor of sustaining an objection of the
4 committee to her designation. Absent some more concrete record
5 I'm not going to rule on it now. But I'll tell you, you're on
6 shaky grounds at this point.

7 But let's proceed by I'm giving you one week to get
8 all the documents produced. Work with Mr. Kaufman to arrange a
9 prompt mutually convenient date for the deposition so that
10 there can be greater clarity as to whether that testimony -- or
11 rather you can use her declaration. We'll use that same in
12 limine schedule for any -- if you're going to make a motion to
13 preclude her testimony, do it with that schedule, and I'll
14 figure it out as part of the argument on May 23rd.

15 Correct. I'll hear that -- just add a motion -- do a
16 motion to preclude the testimony of those two people. If it's
17 not proper rebuttal testimony, if that's the grounds for your
18 motion; they weren't timely designated, whatever you're going
19 to do.

20 You know what the schedule you need to work with to
21 get everything done. The deadline for producing the documents,
22 though, absolutely, is one week from today. Okay?

23 MR. RAINS: Thank so much, Your Honor.

24 THE COURT: All right. Anything else I need to deal
25 with today?

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1 MR. RAINS: Nothing from the debtors, Your Honor.

2 THE COURT: Mr. Kaufman?

3 MR. KAUFMAN: There is one procedural matter, Your
4 Honor. The Court has a customary pre-trial order which we've
5 reviewed. And one of the elements of that pre-trial order is
6 stipulation of facts. I don't know whether the Court insists
7 on the parties following that pre-trial order in this case. It
8 seems to be addressed more to adversary proceedings.

9 THE COURT: This is the strangest trial I have ever
10 done. I'm still trying to get my hands around what this is
11 really all about, what the standards are that apply, is this
12 really a live controversy since the indenture trustees say it's
13 up to them to decide what they're going to do at the end of the
14 day.

15 I put that all to rest for the moment. But I got to
16 tell you, this is really peculiar. I thought -- I actually
17 did -- in preparing to go over things in today's hearing, I
18 thought specifically about that template for a pre-trial order.
19 I would encourage everybody to do a stipulation of facts for as
20 many things as you can resolve. If you're both -- both sides
21 seem worried that thirty hours isn't enough.

22 MR. KAUFMAN: I just think it's going to take -- not
23 that we couldn't stipulate --

24 THE COURT: I'm not insisting on it.

25 MR. KAUFMAN: -- to facts, but given how difficult

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1 resolution of so many issues has been in this case, I just
2 wonder how much time will be spent trying to negotiate the
3 niceties of the stipulations.

4 THE COURT: Fine. Don't do it. But you know, I'm
5 going to -- the twelve- and eighteen-hour allocation is a hard
6 and fast allocation. It's going to eat -- things that you
7 could agree -- well one thing that you definitely ought to try
8 and stipulate to is authenticity and admissibility of
9 documents.

10 MR. KAUFMAN: Right.

11 THE COURT: All right? I'm going to really get testy
12 if we wind up with a lot of testimony here, foundational
13 testimony, to support the admissibility of documents. I mean,
14 don't waste my time with it. So be sparing. You ought to --
15 you all know what the exhibits are at this point, right?

16 MR. KAUFMAN: Yes.

17 THE COURT: I've got tons of them sitting inside.

18 MR. KAUFMAN: We should -- we'll be able to do that,
19 Your Honor.

20 THE COURT: You ought to be able to at least stipulate
21 as to authenticity, and hopefully admissibility. There may be
22 things you want to argue the weight. I mean, I hope when I get
23 motions in limine, we're not going to waste a lot of time over
24 arguments -- if it's appropriate we will, but I mean, on
25 relevance and -- okay?

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1 MR. KAUFMAN: Understood.

2 THE COURT: All right. Others have other issues they
3 want to raise for today?

4 Just a second.

5 MR. KAUFMAN: Oh, I'm sorry. Just one other thing,
6 Your Honor. Do we have a date for a final pre-trial
7 conference? I don't recall that being discussed.

8 THE COURT: May 23rd. The argument of the motions in
9 limine.

10 MR. LIGHTNER: Good morning, Your Honor. Mark
11 Lightner from Cleary Gottlieb on behalf of Wilmington Trust.

12 You raised an issue that I think is resolved, but I
13 just want to be crystal clear. And that are these threshold
14 issues you mentioned, live case or controversy. And I want to
15 make sure that you'll want to address those issues and be
16 prepared on the closing arguments, and not beforehand?

17 THE COURT: Correct.

18 MR. LIGHTNER: Okay. Thank you.

19 THE COURT: Correct. Although I hate to go through
20 this whole exercise only to find out -- put that aside for now.

21 I had my notes on several pieces of paper, here. So
22 let me look.

23 (Pause)

24 THE COURT: All right. I've ticked off everything on
25 my list. No one else has anything else? Mr. Rains?

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1 MR. RAINS: Your Honor, I checked my notes and we've
2 covered everything I had. Thank you.

3 THE COURT: Okay. What I would ask is that Mr. Rains
4 and Mr. Kaufman prepare a fifth revised joint omnibus
5 scheduling order reflecting the dates that we've discussed
6 today and submit it to the Court for signature, okay?

7 MR. RAINS: Will do, Your Honor. Thank you.

8 THE COURT: All right. So the only other thing I
9 didn't review was the issue about the releases. You're going
10 to meet and confer and see if you can resolve in the form of a
11 proposed stipulation and order the scope of the proposed
12 releases. If you can't resolve it, you'll contact chambers and
13 arrange -- I'll decide after hearing, whether we're going to
14 have an in-court or telephone conference to deal with whether
15 there's going to be -- what, if any, briefing will occur on
16 that issue.

17 I hope -- encourage you all to try and agree on that.
18 Okay?

19 MR. RAINS: Thank you, Your Honor.

20 THE COURT: All right. We're adjourned. Thank you
21 very much, everybody.

22 (Whereupon these proceedings were concluded at 11:04 AM)

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I N D E X

RULINGS

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the trial reflecting the new dates discussed		
on the record.		

1

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C E R T I F I C A T I O N

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I, Penina Wolicki, certify that the foregoing transcript is a
5 true and accurate record of the proceedings.

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Penina Wolicki

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PENINA WOLICKI

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Date: March 4, 2013

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March 1, 2013

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